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No. 931

IN THE

# Supreme Court of the United States

~~NO. 913~~ OCTOBER TERM, 1965

GEORGE KUKICH, ALEXANDER G. BRNILOVICH, STANLEY IVOSEVICH, RADE SUSNJAR, RADE MILKOVICH, JOVO ADAMOVICH, DELLA ZEES and DOROTHY CONWAY, individually and on behalf of all other similarly situated, Appellants

v.

SERBIAN EASTERN ORTHODOX CHURCH OF PITTSBURGH, NICHOLAS R. STONE, WALTER R. RANICH, PETER M. NOZINICH, GEORGE ERDEL, LARRY TRBOVICH, JR., ROBERT R. STONE, JOHN VERLINICH, MILAN LUKETICH, SAM VIGNOVICH and GEOGE TRBOVICH, Appellees

On Appeal From the Supreme Court of Pennsylvania

## MOTION TO DISMISS OR AFFIRM

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v.

SERBIAN EASTERN ORTHODOX CHURCH OF PITTSBURGH, NICHOLAS R. STONE, WALTER R. RANICH, PETER M. NOZINICH, GEORGE ERDEL, LARRY TRBOVICH, JR., ROBERT R. STONE, JOHN VERLINICH, MILAN LUKETICH, SAM VIGNOVICH and GEOGE TRBOVICH, Appellees

On Appeal From the Supreme Court of Pennsylvania

## MOTION TO DISMISS OR AFFIRM

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. The case in the Lower Court never involved any statute or treaty of the United States, nor the statute of any State, in which a determination was made upon the validity of the statute, as required by Title 28 U. S. Code, Section 1257 (1) and (2) upon which the jurisdiction in this case is alleged to be based.

2. The Federal questions sought to be reveiwed were neither timely, nor properly raised, nor expressly passed upon by the Courts of Pennsylvania.

3. The Appeal does not present a substantial Federal question.

4. The Supreme Court of the United States is being asked to exercise revisory power over State practice and does not have such power.

## STATEMENT

Appellants are Plaintiffs in an action in equity, filed September 15, 1962, in the Court of Common Pleas of Allegheny County, Pennsylvania. Their Complaint in Equity sought to set aside certain Articles of Consolidation which were approved ten (10) months earlier, on December 4, 1961. The consolidation rejoined two (2) separate church congregations on the South Side of the City of Pittsburgh — the St. Sava Serbian Eastern Orthodox Church and School Parish of Pittsburgh, Pennsylvania and the St. George Serbian Orthodox Church of Pittsburgh, Pennsylvania. Before 1927, these two (2) church congregations had been one and the same church, but a schism occurred in 1927, as a result of which the two (2) churches were formed. For many years thereafter, there had been efforts to rejoin these two (2) church congregations and in 1961, with the Appellants participation, a unity committee was formed, meetings were held, and a favorable vote for consolidation was had in both local churches. Subsequent to the favorable vote of consolidation, meetings of the consolidated group were held and attended and participated in, by the dissident/appellants, before suit was instituted. At all times the appellants were represented by legal counsel.

After filing and full compliance with the provisions of the Non-Profit Corporation Act of the Commonwealth of Pennsylvania, a Decree of Consolidation was signed on December 4, 1961. No objection was made to this Decree, nor appeal taken therefrom.

In October, 1962, after filing and full compliance with the provisions of the Non-Profit Corporation Act of

the Commonwealth of Pennsylvania, a Decree of Amendment of the Name was signed. The application for Amendment had as an Exhibit, a Diocesan Consent, which consent was clear, unconditional, and unequivocal in its approval of the consolidation, as well as the amendment of the name. No objection was made to this application or decree, nor appeal taken therefrom.

On September 15, 1962, the Appellants, comprising the minority group of one of the local congregations, attempted, by a Complaint in Equity, to have the consolidation declared void, alleging that it was improperly done. During the lengthy trial which ensued, there was no proof of any impropriety. The Chancellor concluded that the plaintiffs had produced no credible evidence of any impropriety in the Articles of Consolidation and, upon motion of the Attorneys for Defendants, granted a compulsory nonsuit of the cause.

Prior to, and during the time of the filing of the Complaint in Equity, the Appellants, the Appellees, the Diocese, and the Bishop were all agreeably identified, judicially, ecclesiatically, canonically, and hierarchically, with the Serbian Orthodox Church — Serbian Patriarchate — the highest and superior authority in the Serbian Orthodox Faith.

Although the dissident/appellants no longer followed, nor accepted the authority of the aforesaid higher and superior authority of the Serbian Orthodox Church, the consolidated group, still, as in the past, continues to follow and accept the authority of the aforesaid hierarchical and superior authority.

After completion of the Plaintiff's case in chief, a motion for compulsory non-suit was granted by the trial

judge of the Court of Common Pleas of Allegheny County, Pennsylvania. A direct appeal from the "mere entry of the compulsory non-suit" was made by the Appellants to the Supreme Court of the Commonwealth of Pennsylvania at No. 110 March Term, 1964, reported at 415 Pa. 28, and was quashed as being premature. Appeal in such cases within the Commonwealth of Pennsylvania, lies only from the "Refusal to take off the compulsory non-suit." Thereafter, Appellants attempted to comply with the Rules of Civil Procedure, and filed a motion to remove the compulsory non-suit. A motion to strike their motion was sustained by the court en banc of the Court of Common Pleas of Allegheny County, Pennsylvania. This interpretation of the Rules, by the court en banc, was subsequently affirmed by the Supreme Court of Pennsylvania.

At no time in the Court of Common Pleas of Allegheny County was there alleged the violation of any constitutional guarantee of the Constitution of the United States. Further, no statute of the United States was ever introduced, construed, nor passed upon by the Supreme Court of Pennsylvania, or the Court of Common Pleas of Allegheny County. No statute of the Commonwealth of Pennsylvania was construed as to its constitutionality either by the Supreme Court of Pennsylvania or the Court of Common Pleas of Allegheny County. Appellants never raised any constitutional issue in the Court of Common Pleas of Allegheny County. Further, contrary to their statements in the Jurisdictional Statement, Appellants never raised any constitutional question before the Supreme Court of Pennsylvania.

*Questions Presented.*

Both decisions of the Supreme Court of Pennsylvania were decisions relating to the practice in the State Courts. The first decision ruled that Appellants' appeal was premature since they made no motion to remove the nonsuit in the Court below as required by Pennsylvania statute. The second decision in the Pennsylvania Supreme Court ruled, by affirming the Lower Court, that Appellants had failed to present a motion to remove the compulsory nonsuit in time.

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## QUESTIONS PRESENTED

1. Have the jurisdictional requirements of Title 28, United States Code, Sections 1257 (1) and 1257 (2) been met by this case?

2. May Federal questions be introduced into the case for the first time before the Supreme Court of the United States?

3. Is a substantial Federal question presented?

4. Would the consideration of the present appeal require the Supreme Court of the United States to exercise revisionary power over State Court practice?

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## ARGUMENT

### 1. Failure to Comply With Title 28, U. S. Code, Section 1257 (1) and 1257 (2).

Section 1257 (1) of Title 28 provides that review by the Supreme Court may be had "by appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity." No statute of the United States has been questioned anywhere in the record of the entire proceedings below. A diligent search of the entire record will show that not one United States statute has been cited, questioned, or considered in any manner. The jurisdiction of the Supreme Court of the United States cannot be attached under Section 1257 (1).

Section 1257 (2) of Title 28 permits review by the Supreme Court "by appeal, where is drawn in question the validity of a statute of any State on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Here again, no statute of the Commonwealth of Pennsylvania has been charged with being unconstitutional. The Appellants have failed to point out any statute of the Commonwealth of Pennsylvania which abridges the constitutional guarantees which they say have been thwarted.

In the Statement of Jurisdiction, the Appellants cite several cases which they allege sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal. Appellees have reviewed the cases there cited and submit that each of these cases involves either a statute of a State or a statute of the United States.

Since the present case does not involve a statute of either the Commonwealth of Pennsylvania or the United States of America, Appellees move that the appeal be dismissed.

**2. The Federal Questions Sought to Be Reviewed Were Not Raised Below.**

Prior to the final judgment of the Supreme Court of Pennsylvania in this case, Appellants did not raise any Federal constitutional questions. The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a State Court, it must appear that the Federal questions involved were raised in the State Courts at the proper time: *Hulbert v. Chicago,* 26 S. Ct. 617, 202 U. S. 275, 50 L. Ed. 1026 (1906); *Brown v. Commonwealth of Massachusetts,* 12 S. Ct. 757, 759, 144 U. S. 573, 580, 36 L. Ed. 546 (1892); *John v. Paullin,* 34 S. Ct. 178, 231 U. S. 583, 58 L. Ed. 381 (1914). The law of Pennsylvania requires that constitutional questions be raised in the Trial Court and, if not, they will not be considered on appeal. *Archbishop O'Hara's appeal,* 389 Pa. 35, 46, 131 A 2d 587 (1957); *Montgomery County Bar Association v. Ranalducci,* 329 Pa. 296, 298, 197 A 924 (1938); *Clark v. Rutecki,* 408 Pa. 25, 182 A 2d 687 (1962).

**3. The Appeal Presents No Substantial Federal Question.**

Appellants submit that Federal constitutional questions may not be presented to this Honorable Court unless the precise questions have been placed in issue before the State Courts. This basic procedural requirement is completely absent in this case. In all its appellate stages, this case has involved the interpretation of the statutes and rules of practice in the Courts of the Commonwealth of Pennsylvania; primarily, the timeliness and necessity of filing motions to remove a compulsory nonsuit. Appellants' Jurisdictional Statement confirms the fact that both decisions of the Supreme Court of Pennsylvania were on the requirements for motions to remove compulsory nonsuits. (Pages 6 and 7.)

**4. The Appeal Is an Attempt to Get the Supreme Court of the United States to Exercise Revisory Power Over State Courts.**

Since the appeal is from the Supreme Court of Pennsylvania's rulings that a motion to take off a compulsory nonsuit is necessary before an appeal can be filed to the Supreme Court of Pennsylvania, and that a motion to take off a compulsory nonsuit not filed within the time required by the Rules of Court of the Court of Common Pleas will not be considered, the Appellants attempt to have the Supreme Court of the United States dictate the procedural rules and statutes of the Supreme Court of Pennsylvania. The Supreme Court of the United States has repeatedly held that it does not have revisory power over State practice; *Milkwagon Drivers Union of Chi-*

*cago, Local 753 v. Meadowmoor Dairies, Illinois,* 61 S. Ct. 552, 312 U. S. 287, 85 L. Ed. 836 (1941), rehearing denied 61 S. Ct. 803, 312 U. S. 715, 85 L. Ed. 1145; *First National Bank of Guthrie Center v. Anderson,* 46 S. Ct. 135, 269 U. S. 341, 70 L. Ed. 295 (1926). The decision of a State Court resting on grounds of State procedure does not present a Federal question. *French v. Hopkins,* 8 S. Ct. 589, 124 U. S. 524, 31 L. Ed. 536.

In the present case, counsel for the Appellants failed to properly perfect his grounds for appeal by not raising questions in the Trial Court and in the State Appellate Court which he now claims are constitutional questions. A litigant's misapprehension of steps which its best interests require during trial may be an appealing ground for plea to the hearing tribunals discretion for another chance, but it is not ground for interference by the United States Supreme Court as a denial of a constitutional right. *Market Street Railway Co. v. Railroad Commission of the State of California,* 65 S. Ct. 770, 324 U. S. 548, 89 L. Ed. 1171 (1945), rehearing denied 65 S. Ct. 1020, 324 U. S. 890, 89 L. Ed. 1438.

Since the Supreme Court may not review and revise a State Court's decision on its own practice and procedure, it is submitted that the Supreme Court should affirm the decision below.

## CONCLUSION

For all of the foregoing reasons, Appellee moves that this appeal be dismissed, or in the alternative, that the decision of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

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